



18 September 2007

EUROPEAN COMMISSION'S FIRST STAGE CONSULTATION OF SOCIAL PARTNERS CONCERNING CROSS-BORDER TRANSFERS OF UNDERTAKINGS

INTRODUCTION

1. On 12 March 2001, a Council Directive was adopted on the approximation of the laws of the Member States relating to the safeguarding of employees' rights in the event of transfers of undertakings, businesses or parts of undertakings or businesses which codifies earlier Directives from 1977 and 1998. This Directive, which is based on Article 94 of the EC Treaty, is aimed at protecting employees in the event of a change of employer and, in particular, ensuring that the employees' rights are safeguarded.
2. In its report of the implementation of the Directive, published on 18 June 2007, the European Commission highlights the correct implementation of the Directive's provisions across EU Member States. However, it signals that a potential problem may arise from the fact that cross-border transfers are not explicitly dealt with in the text of the Directive.
3. The European Commission therefore decided to consult European social partners on the need to revise the current EU legislative framework with the purpose of clarifying the scope of application of the transfer of undertakings Directive.
4. In the consultation document, social partners are invited to respond to the following questions:
 - a. Do the social partners agree with the Commission analysis on the issue of cross-border transfers?
 - b. Is it necessary or advisable to amend Directive 2001/23/EC in order to deal with the issue of cross-border transfers with a change in the place of work?
 - c. Is any other type of Community action in this field necessary or advisable?
 - d. Should the collective aspects and the individual aspects of the employment relationship be treated separately?
 - e. Should cross-border transfers with a change in the place of work outside the EEA be subject to specific treatment?

GENERAL COMMENTS

5. **BUSINESSEUROPE's** members report a general uneasiness regarding the purpose of the present consultation. This is due to the fact that the Commission consultation document alludes to questions and problems concerning the application of the Directive to cross-border transfers without being able to explain what they are or give examples of where they occur.

6. The analysis of the Commission seems to mainly stem from a prior study of the CMS group of law firms which highlights potential/theoretical difficulties. However, no practical evidence is brought forward by the Commission to substantiate that analysis. According to BUSINESSEUROPE members, cases of cross-border transfers are extremely rare in practice and their consequences are dealt with in a satisfactory way through the application of existing international and national rules.
7. BUSINESSEUROPE regrets that the process of consultation launched by the Commission therefore seems to be more a “solution in search of a problem” than a real endeavour to associate European social partners to the development of a policy response to a significant labour market challenge.

SPECIFIC COMMENTS

- a. *Do the social partners agree with the Commission analysis on the issue of cross-border transfers?*
8. BUSINESSEUROPE agrees, in broad terms, that transfers within an EU country or cross-border within the EU should be treated in the same way.
9. However, BUSINESSEUROPE would like to insist on the fact that cross-border transfers are in practice extremely limited in numbers. Indeed, for a variety of reasons such as family situation and different languages in the EU, the vast majority of employees do not choose to move from one country to another to continue their employment relationship but prefer instead to benefit from available severance packages. Changing the applicable provisions in a way that would reduce the possibilities for employees to access such payments would therefore not match the Commission objective to ensure the most adequate protection to employees. Finally, the ability of businesses to locate themselves wherever their operations are the most efficient has to be enhanced and not reduced to support EU competitiveness and growth.
10. Moreover, employers believe that some distinctions made by the Commission in its analysis are artificial:
 - The Commission makes a distinction between change of workplace within the EU, preceding, following or simultaneously to the transfer of undertaking. In BUSINESSEUROPE’s view only the third case, if it is recognised that the business maintained its identity, might in theory be problematic due to the difference in national implementation of the EU Directive provisions. However, BUSINESSEUROPE was not informed of any case that could not in practice be solved in an appropriate way by existing law or that could have been better solved thanks to modified EU rules. It is also extremely clear for BUSINESSEUROPE that the EU rules concerning cross-border transfers cannot apply to change of workplace outside the EU.
 - The Commission makes a distinction between how the applicable law is determined for individual and for collective aspects of a cross-border transfer. BUSINESSEUROPE believes that for what concerns individual rights, the Rome convention is a suitable tool to decide on the applicable law. For what concerns collective rights, the applicable law is determined by national conflict rules as well as by the EU Regulation 44/2001. Therefore,

BUSINESSEUROPE cannot agree with the Commission that a substantive problem exists in the application of the employee rules due to the cross-border nature of transfers.

b. Is it necessary or advisable to amend Directive 2001/23/EC in order to deal with the issue of cross-border transfers with a change in the place of work?

11. BUSINESSEUROPE believes that it is neither necessary nor advisable to amend Directive 2001/23/EC. BUSINESSEUROPE has been informed of no single case where the consequences of a cross-border transfer could have been better dealt with thanks to different EU level provisions.

The differences in the way the Directive has been implemented in the different Member States, which may create some uncertainties for companies, could not in any case be resolved by a modified EU level text. Moreover, attempts to reduce the degree of flexibility members states have to implement key aspects of the directive in line with national circumstances would be contrary to the principle of subsidiarity.

c. Is any other type of Community action in this field necessary or advisable?

12. BUSINESSEUROPE believes that other type of actions such as information campaigns or exchange of experiences are useful tools when problems or differences of approaches exist which can be solved through enhanced dialogue and awareness. This is however not the case here, where there is no evidence of a practical problem in the management by companies of cross-border transfers.

13. In some years, an empirical research could be conducted to see if, due to increased business exchanges within the EU, the situation of quasi-inexistence of cross-border transfers implying a move of employees has changed.

d. Should the collective aspects and the individual aspects of the employment relationship be treated separately?

14. For the reasons already described above in §10, BUSINESSEUROPE sees no need for a separate treatment of collective and individual aspects of the employment relationship.

e. Should cross-border transfers with a change in the place of work outside the EEA be subject to specific treatment?

15. BUSINESSEUROPE believes that the logic of protecting some jobs from moving outside the EU through an application of the EU Directive outside the EU/EEA is flawed. It would result in constraining EU businesses from competing with non-EU rivals, would be detrimental to Europe's economy and would run against the objectives of the EU growth and jobs strategy.

16. The task of the European Union, as described in Art. 2 of the Treaty, is "to promote a high level of employment and social protection (...) throughout the community". Therefore, the European Union is not competent to ensure that EU law applies in countries falling outside the scope of the Treaty. Besides, BUSINESSEUROPE fails to see how in practice that could be ensured.

CONCLUSION

17. Cross-border transfers of undertakings in the meaning of the EU Directive are extremely limited in numbers and in practice do not raise problems which need remedy. BUSINESSEUROPE therefore regrets that the process of consultation launched by the Commission seems to be more a “solution in search of a problem” than a real endeavour to associate European social partners to the development of a policy response to a significant labour market challenge.
18. BUSINESSEUROPE believes that it is neither necessary nor advisable to revise the EU Directive on the issue of cross-border transfers. European employers do not see the need for any other kind of Community action in this field in the near future.
19. Finally, BUSINESSEUROPE is of the opinion that the European Union is not competent for ensuring that EU law applies in countries outside the EU/EEA. Moreover, this would result in an unjustified constraint on European companies’ operations.